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IN THE

Supreme Court of The United States

OCTOBER TERM, 1963

No. 612

JOHN MILTON ADDISON, ROBERT C. OLSON, WILLIAM D. GROOM, JAMES D. (BOB) SCOGGINS, JOHN R. METZ and MILES A. WHITE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that this Court grant rehearing of its Order of February 17, 1964, denying the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and that a writ of certiorari issue on the point set out below to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case as prayed for in the Petition filed November 12, 1963, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time of this Court's order of February 17, 1964, the petitioners, urging conflicting decisions, sought review, *inter alia*, of the question as to whether the court reporter's failure to transcribe summations, during which the prosecution made improper and inflammatory appeals to the jury,[1] necessitated a new trial. (Pet. 4, 17, 27-29). Not previously presented here are the constitutional and statutory grounds for review arising from the facts surrounding the failure to record the summations, and of which the court below was apprised.

Petitioners, at the time of trial, alleged themselves to be impoverished: Addison was bankrupt. (Tr. 1843); several of the petitioners had filed paupers' oaths and witness fees for defense witnesses were paid by the Government; attorneys' fees and appeal bonds were paid or promised by others; and in the case of Miles A. White, counsel Robert H. Power, was court appointed. (Forma Pauperis Hearing of March 30, 1961 ("F.P.") 2). As set out in his Affidavit (Rehearing Appendix ["Reh. App."] A, *infra*), counsel Power had been admitted to practice for less than three years, and his only Federal Court experience had been one civil case. Consistent with the requirements of State Court practice, Power, during a

[1] The court below, and the Government here, approached the question as being whether the mere failure to record the arguments was *per se* reversible error. Finding that the "record is silent" as to objections by petitioners during trial, and also a failure to set out any improper remarks "in their original brief", the court held the error to be nonprejudicial. (Op. 3) The court below completely ignored, however, the asserted inflammatory remarks described in petitioners' Reply Brief (pp. 15-16), the use of which, even without objection, has required reversal. See *Getchell v. United States*, 282 F.2d 681 (C.A. 5th). Moreover, petitioners have been deprived of their right to establish proof of inflamatory remarks. See paragraph 4, *infra*.

recess just prior to jury arguments, approached the court reporter, T. C. Irby, to request that the summations be recorded. The reporter advised Power that argument would not be recorded since "no one has made prior arrangements for assuring my fee for doing so". Upon being asked if he would pay for the recording, Power, refreshing the reporter's recollection, explained that his client was impoverished and that he had no funds with which to pay for recording of summations. The reporter thereupon indicated that as far as he was concerned the arguments would not be recorded. Being unaware of the Court Reporter Act, Power assumed that the demand for prior fee arrangements was proper and, letting the matter drop, returned to his task of preparing his final argument. And although this demand for pre-payment of recording fees was expressly called to the attention of the Fifth Circuit, during oral argument by counsel Power, it went unconsidered by such court.[2] (Reh. App. A, pars. 6-9; see also Affidavit of James L. Guilmartin and Stanley Jay Bartel, Reh. App. A).

Thus, this is another facet of the numerous cases coming before this Court involving invidious discrimination against the poor solely because of their indigency.

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[2]The sole testimony to the contrary was submitted more than one year after trial by the court reporter, a man of 70 years (S.R. 76), who was attempting to justify his admitted violation of the statutory requirements of §753(b), 28 U.S.C. During the supplemental hearing the trial court effectively foreclosed an attempt by counsel Power to refresh the recollection of the reporter, with respect to the circumstances surrounding the failure to record summations, by concluding that had Power deemed the matter to be of any importance, he would have so apprised the court. (Reh. App. B; S.R. 86-87) The dispute was apparently disposed of completely upon the reporter's negative answer to the trial court's inquiry as to whether there were any objections to the reporter's inaction. (Reh. App. B; S.R. 89)

See *e.g. Douglas* v. *California*, 372 U.S. 353; *Gideon* v. *Wainwright*, 372 U.S. 335; *Griffin* v. *Illinois*, 351 U.S. 12; *Lane* v. *Brown*, 372 U.S. 477. The pre-payment of fees as a prerequisite to a full and adequate review on appeal has been soundly condemned. (*Griffin* v. *Illinois*, *supra*; *Jeffries* v. *State*, 9 Okla. Cr. 573, 576, 132 Pac. 823) and any procedure which allows the trial court, an officer of the court, or an officer outside the judicial system to deprive an indigent of any hope for a full review of his conviction, based on such indigency alone, is clearly violative of constitutional standards of due process and equal protection of the laws. *Eskridge* v. *Washington State Prison Board*, 357 U.S. 214; *Lane* v. *Brown*, *supra*; *Douglas* v. *California*, *supra*; *Draper* v. *Washington*, 372 U.S. 487. This is true even where the record, as here, is unclear and the errors hidden, and notwithstanding the Government's contention (Opp. Br. 12-13) that petitioners must show "a substantial claim" that substantive error occurred during summation which could not be reviewed without a transcript. This Court, in *Douglas* v. *California*, has just condemned a procedure that deprives an indigent defendant of an adequate review of his conviction in the absence of a showing of preliminary merit to his appeal or that an injustice was committed, which requirement would be avoided by a rich man. Cf. *Johnson* v. *United States*, 352 U.S. 565; *Ellis* v. *United States*, 356 U.S. 674, 675.

2. Having been apprised of the circumstances giving

Compare also *Jencks* v. *United States*, 353 U.S. 657, rejecting a requirement that before an accused can compel production of a third party's report to the F.B.I. to determine whether such report conflicts with the witnesses' testimony, the accused must first show that such a conflict exists.

rise to the reporter's failure to record summations, the court below has decided an important question of federal law involving the administration of criminal justice which has not been, but should be, settled by this Court. Thus, while the law permits a court reporter to require prepayment of estimated cost of transcribing recorded proceedings, expressly excepted therefrom are the costs of transcripts payable by the United States in criminal proceedings because the accused has been allowed to defend or appeal in forma pauperis. 28 U.S.C. §753(f). This presupposes that the reporter will have complied with the mandatory provisions to record all phases of the criminal case. §753(b). If, as the court below in effect held, and the Government contends (Opp. Br. 12-13), a reporter can refuse to record all phases of criminal proceedings because of the inability of any accused to pre-pay the estimated cost of a transcription (should it become necessary for appeal), such accused, upon subsequently establishing his right to appeal in forma pauperis, is effectively deprived of his right to a free transcript under 28 U.S.C. §753(f), so necessary for a full and adequate review of his conviction. And this is of even greater significance where such accused, at the time of trial, in fact may have been reduced to pauper status, although not officially so declared by the court. Such deprivation is of course a denial of due process and equal protection of the laws to the accused solely because of his indigency.[4] *Griffin v. Illinois*, *supra*. Most importantly, however, the decision below not only destroys the plain and simple distinction between the necessity to record and the subsequent tran-

[4] This is equally true where, as here, the petitioners were alleged to be pauper status during trial but were denied the right, after hearing, to appeal in forma pauperis (R.P. 19).

scribing of such recordation,[5] but in effect nullifies §1915, 28 U.S.C., which authorizes proceedings in forma pauperis. Our Constitution and laws have been designed to assure fair trials in which every defendant stands equal before the law (*Gideon* v. *Wainwright*, *supra*), and the forma pauperis statute stands among the first in this aim. However, in the absence of a proper review of the court's holding, the right to appeal in forma pauperis becomes an empty ritual; a free transcript is useless where there is nothing to record.[6]

3. The Government contends, and the court below held, that petitioners could have corrected the error resulting from the reporter's non-compliance with the statute by a Civil Rule 75(n) hearing, but not only did they refuse to invoke this corrective procedure, they also opposed the Government's efforts to utilize the rule to supplement the record.[7] (Op. 4-5; Opp. Br. 13-14). Con-

[5] The reporter is entitled to charge parties only for the transcriptions made from the recordings. It seems clear, however, that the reporter does not go uncompensated for the recording since §753(e) provides for an annual salary, which is in addition to the transcription fees. Cf. *Jeffries* v. *State*, 9 Okla. Cr. 573, 132 Pac. 823, 824.

[6] The frequency with which court reporters have failed to record portions of criminal proceedings in the past few years requires this Court to assert its power of supervision. See e.g. *Strauss* v. *U.S.*, 311 F.2d 926 (C.A. 5th); *Brown* v. *U.S.*, 314 F.2d 293 (C.A. 9th); *Stephens* v. *U.S.*, 289 F.2d 308 (C.A. 5th); *Parrott* v. *U.S.*, 314 F.2d 46 (C.A. 10th); *U.S.* v. *Taylor*, 303 F.2d 165 (C.A. 4th); *Poole* v. *U.S.*, 250 F.2d 396 (CADC); *Fowler* v. *U.S.*, 310 F.2d 66 (C.A. 5th); *U.S.* v. *Smith*, 310 F.2d 121 (C.A. 4th).

[7] The charge that petitioners actually opposed the Government's attempt to use Rule 75 is misleading. Since the supplementation as proposed by the Government related not to evidence and testimony actually adduced during the time of trial, but to extra-judicial evidence, counsel for petitioners, on appeal, objected thereto. In any event, petitioners reserved the right to be heard and submit evidence, but were denied the right by the court below, who deemed it unnecessary to rule on the propriety of the supplemental hearing. (Pet. 18-19; Op. 5). This denial without the right to be heard was a further deprivation of constitutional rights. *Griffin* v. *Illinois*, *supra*, p. 17.

trary to the court's implicit ruling, however, the mere availability of the "civil" proceeding to correct defective records in criminal cases was not intended to cast upon an accused the burden of proof and persuasion on appeal. Cf. *Coppedge* v. *United States*, 369 U.S. 438, 447-448; *Carnley* v. *Cochran*, 369 U.S. 506, 514. To compel an indigent, solely because of his poverty, to assume the burden of supplementing and reconstructing a complete record, if he would have a full and adequate review, casts upon him a burden of proof inconsistent with the established principles of criminal justice and due process of law. *Douglas* v. *California*, *supra*, 355; compare *Griffin* v. *Illinois*, *supra*, p. 17; *Burns* v. *Ohio*, 360 U.S. 252.

4. Again, the court of appeals has so far sanctioned a departure from the usual course of judicial proceedings by a trial court, as to call for an exercise of this Court's power of supervision. As support for its finding of harmless error, the court below held that there was waiver of the recording requirement since the trial court, at the supplemental hearing, found that counsel for "each of the defendants * * * stated to him [the reporter] that they did not wish to have him report the oral arguments." (Op. 4). Such finding was based solely on the affidavit testimony of the court reporter, contradicted on cross-examination (S.R. 79, 80, 88), who was attempting to justify his admitted violation of his job requirements. In view of the unequivocal legislative history and intent behind §753(b) to safeguard the rights of criminal defendants against human infirmities; (see *Miller* v. *U.S.*, 317 U.S. 192; *Poole* v. *U.S.*, 250 F.2d 396, 399 (C.A.D.C.)) it was incumbent upon the trial court to require and assist in a full hearing, including all persons who took part in the proceedings, particularly the six local trial counsel

for petitioners (as noticed by the court below), with each being given an opportunity to testify and re-create an accurate record as to what transpired. *U.S.* v. *Taylor*, 303 F.2d 165 (C.A. 4); *U.S.* v. *Sevilla*, 174 F.2d 879, 880 (C.A. 2); *Poole* v. *U.S.*, *supra*. To the contrary, the trial court was satisfied with the reporter's negative answer to his inquiry as to whether any counsel objected to his "inactivity" (S.R. 89). However, this not only falls far short of the basic standards of waiver in the administration of criminal justice (compare *Carnley* v. *Cochran*, 369 U.S. 506, 512-516) but also improperly casts a fundamentally unfair burden of proof on petitioners,[8] which in the final analysis necessitates the exercise by the Court of its power of supervision.

[8]The burden was especially severe in view of the trial court's observation to counsel, during the supplemental hearing, that "we have such a high regard for the lawyers that come before us in Court, and for the officers of our Court that testify, and when they speak, not under oath or when they speak under oath, we deeply regret when any reflection is cast upon them." (S.R. 115).

CONCLUSION

For the reasons set forth above and in the specified sections of the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted.

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CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

JAMES L. GUILMARTIN

STANLEY JAY BARTEL

GEORGE ELIAS, JR.

FULLER WARREN

APPENDIX A

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1963

NO. 612

JOHN MILTON ADDISON, ROBERT C. OLSON, WILLIAM D. GROOM, JAMES D. (BOB) SCOGGINS, JOHN R. METZ and MILES A. WHITE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF ROBERT H. POWER

STATE OF TEXAS)
) ss:
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority duly authorized to administer oaths and take acknowledgements, personally appeared ROBERT H. POWER, who, after being first duly sworn, deposes and says upon his oath that:

1. My name is ROBERT H. POWER.

2. I am an attorney admitted to practice in the State of Texas in 1958.

3. Shortly before the trial of the above cause in the United States District Court for the Northern District of Texas, Dallas Division, I was appointed by the Honorable T. Whitfield Davidson, United States District Judge, to represent one of the defendants in the above-styled cause, MILES A. WHITE, who had been found by the Court to be a pauper.

4. As of the time of this appointment, I had been admitted to practice in Texas for less than three (3) years and had never defended a criminal case in Federal Court. My only Federal Court experience had been one civil case.

5. At the time of this trial, I was twenty-seven (27) years of age.

6. At the close of the testimony, and immediately prior to the commencement of arguments to the jury, I approached the Court Reporter who had been transcribing this trial, T. C. Irby. This was during a recess.

I inquired of the Court Reporter whether final arguments were to be recorded. I made this inquiry because, under state practice, as I then knew it, closing arguments were reported by the Texas State Reporters when requested.

7. When I asked Mr. Irby if the final argument in this case would be recorded, he replied: "No. No one has made prior arrangements for assuring my fee for doing so".

I explained to Mr. Irby that I represented an impoverished client, as he well knew, and that I did not have any funds from my client to pay for recording of the final arguments to the jury.

He thereupon indicated that closing arguments would not be recorded.

8. At the time of this discussion with Mr. Irby, I had been continuously in the trial of this case for some four (4) weeks. I was preoccupied with my own closing argument, which I was then to deliver to the jury within the next several hours.

I did not know at the time of my conversation with Mr. Irby that there was any duty of a court reporter to record closing arguments under the Federal Statutes. I assumed that Mr. Irby's comments regarding prior arrangements for his fee was perfectly proper and I thereupon returned to my task of preparing my closing argument.

9. During the oral argument before the Court of Appeals for the Fifth Circuit in the above cause, I appeared briefly before that Court and explained to the Court what had transpired during the trial proceedings. As I have indicated above, I told the Court of Appeals of Mr. Irby's discussion regarding pre-payment of pre-arrangements as to his court reporter's fees and his failure to record the closing arguments.

ROBERT H. POWER

SWORN TO and SUBSCRIBED before me this day of March, 1964.

Notary Public
State of Texas

My Commission expires:

[TITLE OMITTED]

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

BEFORE ME, the undersigned authority duly authorized to administer oaths and take acknowledgements, personally appeared JAMES L. GUILMARTIN and STANLEY JAY BARTEL, who, after being first duly sworn, depose and say upon their oath that:

1. They are and have been appellate counsel for the petitioners herein since shortly after the filing below of the Notice of Appeal to the Court of Appeals for the Fifth Circuit.

2. In the course of their representation of petitioners, they have carefully interrogated ROBERT H. POWER, ESQ., both personally and by telephone, concerning the conversation he had with the Court Reporter below related in Mr. Power's affidavit dated March ... 1964.

3. On each and every such occasion, Mr. Power has consistently held to the version of that conversation related in his affidavit. Deponents firmly and in good faith believe Mr. Power to be accurately relating that conversation to this Court.

4. Both of your deponents were present at oral argument before the Court of Appeals below, during which time Mr. Power, speaking as an officer of that Court, related his conversation with the Court Reporter, in substantially the same manner set forth in his affidavit, to the Court of Appeals.

JAMES L. GUILMARTIN

STANLEY J. BARTEL

Sworn to and subscribed before me this day of March, 1964.

Notary Public
State of Florida at Large

APPENDIX B

CROSS EXAMINATION

[PP. 86-87]
BY MR. POWER:

Q Mr. Irby, I would like to ask you one or two questions, please.

A Sure.

Q I know it has been a long time ago that we were here on this trial and the specific reason of my question is hoping that you can refresh my recollection as to whether I am right or wrong. It is my recollection that at the time when the argument to the jury was about to commence, that you and I had a conversation in the hallway concerning the taking down of these arguments. Do you recall such a conversation?

A No, I don't recall it.

Q Do you recall any comment that you might have made to me wherein you said that no one had said they were going to pay for the taking down of the jury argument?

A I don't think I said that, because I am not entitled to pay for it. I never charge for taking argument.

Q I understand this. I am not trying to say you did.

A When I transcribe them, I charge for it, but I don't think I said that.

Q But your recollection is that you and I had no such conversation?

A I don't know whether we had conversation or not. I just don't remember.

THE COURT: We might ask you, counsel, if you requested the Court to require the court reporter to do that?

MR. POWER: Your Honor, if you will recall, I was just still wet behind the ears, and I sure didn't. I surely didn't. I don't recall requesting the Court to do it, to be perfectly honest with the Court. I just seem to recall having a conversation with Mr. Irby and I am certainly not hearsaying, —

THE COURT: The Court feels if you attach that importance to it, with the diligence that you usually show, you would have come to the Court with it.

MR. POWER: Yes, sir.

[pp. 89]

THE COURT: . . . I might ask him, however, with reference to the argument, if you remained in the room while the case was being argued?

THE WITNESS: I did. I sat right there while the case was being argued for the purpose of taking down any objection or exception to the argument.

THE COURT: Was there any requests made of the Court that the Court Reporter write that down?

THE WITNESS: No.

THE COURT: Report the argument?

THE WITNESS: No request was made.

THE COURT: There was no objection to your inaction?

THE WITNESS: No.